IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1505

ESSEX COUNTY WELFARE BOARD, *Petitioner*

v.

DEPARTMENT OF INSTITUTIONS AND AGENCIES, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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TABLE OF CONTENTS

CASES: Page

STATUTES AND REGULATIONS:

Page

CONGRESSIONAL MATERIALS:

MISCELLANEOUS:

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Petitioner Essex County Welfare Board respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court of New Jersey.[1]

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey, not yet officially reported, is reproduced as Appendix A to this petition. The opinion of the Appellate Division of the Superior Court of New Jersey, which is reported at 147 N.J. Super. 546 (1977) and 371 A.2d 771 (1977), is reproduced as Appendix B.

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[1] The Camden County Welfare Board, Sondra Engle, Irene Stowers, Ann Grieco, Louise Brown, Linda Perazelli and Arlene Gibson were also parties to the proceedings in the courts below.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on January 5, 1978. By order of March 23, 1978, Mr. Justice Brennan extended the time for filing a petition for writ of *certiorari* to and including April 20, 1978. This petition is filed within that time. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the "single State agency" requirement of the Social Security Act, 42 U.S.C. § 602(a)(3), and the regulations thereunder, preclude a county welfare board from seeking judicial review of a single State agency's fair hearing decision ordering the county welfare board to make benefit payments, in part, from county funds.

STATUTES INVOLVED

This case involves the effect of the "single State agency" requirement of 42 U.S.C. § 602(a)(3). That section reads in pertinent part:

> "(a) A State plan for aid and services to needy families with children must . . . (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan . . . ."

REGULATIONS INVOLVED

The Department of Health, Education and Welfare (HEW) has issued regulations concerning the "single State agency" requirement of the Social Security Act. These regulations are found at 45 C.F.R. § 205.100. The

relevant portions are reproduced as Appendix C to this petition.

STATEMENT OF THE CASE

A. Background

This case involves the Aid to Families with Dependent Children (AFDC) program, the purpose of which is to provide financial assistance to needy children. The AFDC program, codified at 42 U.S.C. §§ 601-610, and other public assistance programs mandated by the Social Security Act, constitute a "scheme of cooperative federalism"[2] in which both the federal and state governments exercise varying degrees of responsibility. Although state participation in the AFDC program is optional, *see* 42 U.S.C. § 601, those states which do elect to participate must comply with the federal statutory requirements set forth in 42 U.S.C. § 602(a) in order to be eligible to receive federal funds.[3] New Jersey participates in the program and receives 50% of AFDC grant money from the federal government. The State provides 37.5% of the grant money, and the remaining 12.5% must be raised by the county in which the claimant resides. *See* N.J.S.A. 44:10-1 *et seq.*

One of the requirements imposed by the federal statute is that a state must designate a "single State agency" to administer or supervise the administration of a plan to provide aid and services to needy families with children. 42 U.S.C. § 602(a)(3). In New Jersey

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[2] King v. Smith, 392 U.S. 309, 316 (1968).

[3] All fifty states currently participate in the program. Lupu, Welfare and Federalism: AFDC Eligibility Policies and the Scope of State Discretion, 57 B.U.L. Rev. 1, 2 n. 7 (1977).

the "single State Agency" is the Department of Institutions and Agencies (now Department of Human Services), Division of Public Welfare. N.J.S.A. 44:10-2; 44:10-3. New Jersey is, however, one of the eighteen states which has elected to supervise the administration of (rather than to administer) the AFDC program.[4] In New Jersey the Department of Institutions and Agencies has adopted general policies, rules and regulations for the AFDC program, but the program is actually administered at the local level by county welfare boards. *See* N.J.A.C. 10:71-1.1 *et seq.*

The county welfare boards, whose establishment is mandated by New Jersey statute, *see* N.J.S.A. 44:7-7, are "corporate entities with power to sue and be sued . . . ." N.J.S.A. 44:4-20. They are composed of not less than five nor more than seven citizens of the county who are appointed by the Board of Chosen Freeholders (the governing body of the county). N.J.S.A. 44:1-11. In addition, two members of the Board of Chosen Freeholders and the county adjuster sit on the welfare board as *ex officio* members. *Id.*

B. The Proceedings Below

This litigation arises out of six cases (four in Essex County and two in Camden County) in which decisions rendered by the county welfare boards had the effect of terminating or reducing benefits received by individual claimants under the AFDC program. In each case, the claimant exercised her right to a fair hearing before the New Jersey Department of Insti-

[4] Social Security Administration, Characteristics of State Plans for Aid to Families with Dependent Children under the Social Security Act—Title IV-A, at vi (1976).

tutions and Agencies, Division of Public Welfare. Each of the determinations of the county welfare boards was reversed and a final decision rendered in favor of the AFDC claimant. The county welfare boards thereafter filed notices of appeal to the Appellate Division of the Superior Court.

The Department of Institutions and Agencies, and two of the individuals, moved to dismiss five of the appeals on the ground that a county welfare board does not have the right to appeal a fair hearing decision.[5] The Appellate Division held (1) that New Jersey law gives a county welfare board standing to appeal from a fair hearing decision of the state welfare agency and (2) that the county welfare board's right to appeal is not abrogated by the single State agency requirement imposed by federal law. App. B at 16a-20a.

On appeal, the Supreme Court of New Jersey addressed only the latter issue. First it noted that AFDC is a federal program and that those states which choose to participate "must comply fully with federal law and regulations." App. A at 4a. The court explained that "federal AFDC law requires that a State plan provide for the establishment or designation of 'a single State agency' to administer the program," and that applicable federal regulations deny subordinate local agencies " 'authority to review, change or disapprove any administrative decision of the single State agency, or otherwise substitute their judgment for that of the agency as to the application of policies, rules and regulations promulgated by the State agency.' " *Id.* at 4a-5a.

[5] The same issue was raised in the sixth case by opposition to a motion to reinstate the appeal, which had been dismissed for want of prosecution.

Citing the relevant state statutes, the court found that New Jersey has elected to participate in the AFDC program. *Id.* at 4a. It recited that the single State agency in New Jersey is the Department of Institutions and Agencies, Division of Public Welfare, citing the applicable New Jersey statute, and that county welfare boards "actually administer the program at the local level subject to the supervision of the Department", citing applicable state regulations. *Id.* at 5a.

The court then recognized that fair hearing decisions are subject to judicial review and acknowledged that both welfare claimants and the governing bodies of the counties involved have standing to obtain such review. *Id.* But the court disagreed with the Appellate Division's ruling that the county welfare board could appeal:

> "The county welfare board though, in administering the AFDC program, is a subordinate branch of the single State agency and has no standing as such to have judicial review of fair hearing decisions by its superior agency. In its capacity as local administrator, it exercises a statutory function in the overall program. It has no other interest to assert." App. A at 6a.

After setting out certain policy considerations allegedly supporting its conclusion, the court summarized its holding:

> "On balance, we conclude that the legislative intent as expressed in the Federal and State enactments [implementing the single State agency requirement], does not allow for an appeal by a local welfare board from a fair hearing decision by the Division which modifies or reverses a ruling of the local board." *Id.* at 7a.

The federal question—the effect of the "single State agency" requirement of the Social Security Act on the right of a county welfare board to seek judicial review—was raised in briefs both before the Appellate Division and before the New Jersey Supreme Court. The Supreme Court rendered a decision on that question, and its decision rests on no independent state ground.[6] The issue is therefore appropriate for review by this Court.

REASONS FOR GRANTING THE WRIT

The decision below holds that a preemptive requirement of federal law—the single State agency provision of the Social Security Act—precludes appeals from AFDC fair hearing decisions by county welfare boards, (1) even where the benefits found owing to claimants are paid, in part, from county funds, and (2) even though the claimant himself, the adverse party in the

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[6] That the New Jersey Supreme Court's decision denying county welfare boards the right to appeal is grounded in federal rather than state law is made clear by its acknowledgments that the governing body of the county (the Board of Chosen Freeholders) is permitted to appeal "since it provides a substantial part of the AFDC grant money." App. A at 5a. As set out above, the welfare board is composed of freeholders and their appointees; it is thus the representative of the freeholders specifically charged with fiduciary responsibility for the grant money provided by the county. Essex County Welfare Board v. Cohen, 299 F. Supp. 176, 179 (D.N.J. 1969). To paraphrase the New Jersey Supreme Court: "If the Court will allow [the Freeholders] to sue, standing of a representative [board] would seem almost *a fortiori.*" Crescent Park Tenants Ass'n v. Realty Equity Corp. of New York, 58 N.J. 98, 106, 275 A.2d 433, 437 (1971). The court's only asserted basis for permitting the Freeholders to appeal while denying that same right to the welfare board is the latter's status as "a subordinate branch" (App. A at 6a) of the single State agency which federal law requires the State to designate.

fair hearing, is permitted to appeal. The crippling effect of this decision on the accountability of local administrators for county AFDC funds and for the program they are required to administer cannot be overstated. No matter how greviously the fair hearing officer has erred in favor of an AFDC claimant, the county welfare board—which has fiduciary responsibility for a portion of the funds involved and which has expertise in and continuing administrative responsibility for the AFDC program—may not question such errors through the appeal process established by the State.

The issue presented is a significant one, as we demonstrate in Part I, *infra*. The AFDC program is mammoth, entailing many thousands of fair hearings each year in the eighteen states which have local administration of that program. The lower court's erroneous interpretation of federal law threatens to preempt contrary state law in several jurisdictions, and, since the single State agency provision is also found in other titles of the Social Security Act, the impact of its decision will be felt throughout all facets of the welfare and Social Security systems.

As set out in Part II, below, the New Jersey court's decision is wholly unsupported by the language of the federal statute, by its legislative history, or by the regulations promulgated thereunder. Moreover, the construction of the Social Security Act adopted by the lower court, imposing severe and discriminatory restrictions on standing to appeal in the New Jersey state courts, presents grave constitutional questions under the Fifth and Tenth Amendments.

I. THE DECISION BELOW RAISES A SIGNIFICANT, RECURRING AND PERVASIVE ISSUE OF NATIONAL IMPORTANCE CONCERNING THE ADMINISTRATION OF THE AFDC PROGRAM.

A. The Issue Presented Is Significant.

This case raises, in the context of the AFDC program, an important issue—not previously addressed by this Court—concerning the interpretation of a key provision of the Social Security Act. The question whether 42 U.S.C. § 602(a)(3) prohibits a local administrator from seeking judicial review of a fair hearing decision of the "single State agency" directly affects administration of the AFDC program in eighteen states. In addition to New Jersey, populous States such as New York and California, in which the AFDC program is also administered at the local level, would be affected.

The potential impact of the decision is evidenced by the number of fair hearings requested by public assistance claimants. During the six-month period, January through June 1976, there were 75,188 such requests.[7] Of that number, 58,430 or 78% involved the AFDC program; 1,328 AFDC fair hearing requests were made in New Jersey alone.[8] The significance of these numbers is further underscored by the fact that approximately one-third of the cases in which fair hearing requests were made during 1975 and 1976 were decided in favor of the claimant.[9]

AFDC is one of the largest federal assistance programs. AFDC cash payments totalled $8.9 billion, $9.9

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[7] Hearings in Public Assistance (January-June 1976), DHEW Publication No. (SRS) 77-03257 (published April 1977), at 7.

[8] *Id.*

[9] *Id.* at 4.

billion and $10.1 billion in fiscal years 1975, 1976 and 1977, respectively.[10] In the month of September 1977 alone, AFDC cash payments were $852 million nationally and $39 million in New Jersey.[11]

B. The Issue Presented Is Recurring.

Whether the Social Security Act prohibits a county welfare board from seeking judicial review is a recurring issue which warrants resolution by this Court. Respondent Department of Institutions and Agencies conceded in its brief to the New Jersey Supreme Court that "[t]he issue of a county welfare board's standing is not an isolated one . . ." in New Jersey.[12]

Moreover, courts in other States have ruled contrary to the decision below. In *Clemente* v. *Fahey,* —— App. Div.2d —— (App. Div. N.Y. 1978), reproduced as Appendix D to this petition, the Appellate Division of the New York Supreme Court recently reached a conclusion directly contrary to the decision of the Supreme Court of New Jersey in this case. In *Clemente* the trial

[10] Public Assistance Statistics—September 1977, HEW Publication No. (SSA) 78-11917 (published March 1978) at 3-4.

[11] *Id.* at 16, 19.

[12] This litigation alone involves six separate cases. In a previous case an assertion that petitioner lacked standing because of the single State agency requirement was rejected and petitioner was allowed to litigate the constitutionality of a federal statute because it "has an interest in the funds it will be required to expend. . . ." Essex County Welfare Board v. Cohen, 299 F. Supp. 176, 179 (D.N.J. 1969). In other previous cases, petitioner has been permitted to appeal from fair hearing decisions both without mention of the issue presented here, Essex County Welfare Board v. Dept. of Institutions and Agencies, 139 N.J. Super. 47, 352 A.2d 270 (1976), and without decision of that issue, Essex County Welfare Board v. Dept. of Institutions and Agencies, 139 N.J. Super. 191, 353 A.2d 132 (1976).

court refused to permit a county welfare commissioner to challenge a fair hearing decision of New York's single State agency. The New York Appellate Division reversed, holding that the county welfare commissioner had standing and a fiduciary obligation to challenge expenditures of AFDC funds he believed improper. App. D at 24a-25a. The court then stated that its decision

> "in no way conflicts with Federal statutes and regulations mandating a single State plan for aid and services to the needy (see, e.g., U.S. Code, tit. 42 § 602, subd. [a], par. 1) to be administered by a single State agency (see, e.g., 45 CFR 205.100). These Federal guidelines are neither circumvented nor ignored by a grant of standing in this instance because the resultant judicial determination will establish a unified policy for the State and said policy will then be administered by the State agency throughout the State . . . . [S]ince the review [of the single State agency's decision] is conducted by the courts and not the local agencies, there is also no conflict with 45 CFR 205.100, which prohibits review of any administrative decision of of the State agency by a local unit." *Id.* at 25a.[13]

Thus, the courts of New York and New Jersey, which have developed two of the largest bodies of public assistance law in the nation, have reached opposite conclusions on the same question. Such a conflict should be resolved by this Court.

Courts in still other States have permitted appeals by local welfare administrators without discussing the federal law issue. *See, e.g., Town of Natick*

[13] *See also* Oswego County Dept. of Social Services v. Toia, 92 Misc. 2d 871 (Sup. Ct. N.Y. 1977).

v. *Massachusetts Department of Public Welfare,* 341 Mass. 618, 171 N.E.2d 273 (Mass. 1961); *Attorney General* v. *Bureau of Old Age Assistance of Cambridge,* 324 Mass. 63, 66, 84 N.E.2d 536, 538 (1949); *Bureau of Old Age Assistance of Natick* v. *Commissioner of Pub. Welfare,* 326 Mass. 121, 93 N.E.2d 267 (1950). Under the lower court's decision, preemptive federal law would require a contrary result in these jurisdictions. This Court should not permit such preemption on the basis of erroneous interpretation of federal statutes.

C. The Issue Presented Is Pervasive.

Finally, the decision threatens to have a pervasive effect on areas of public assistance other than AFDC. The identical single State agency requirement exists in four other major titles of the Social Security Act: Title I (Old Age and Survivors Pensions—42 U.S.C. 302(a)(3)); Title X (Aid to the Blind—*id.* § 1202(a)(3)); Title XIV (Aid to the Permanently and Totally Disabled—*id.* § 1352(a)(3)); Title XIX (Medicare—*id.* § 1396a(a)(5)). Thus, if not reviewed, the New Jersey decision (an opinion from the highest court of a State with one of the largest bodies of public assistance law) will exist as precedent for similar usurptions of local governmental authority by state agencies in connection with these other federal assistance programs.

II. THE DECISION BELOW MISCONSTRUES THE SINGLE STATE AGENCY REQUIREMENT AND RAISES SERIOUS CONSTITUTIONAL QUESTIONS.

A. Congress Did Not Intend That the Single State Agency Requirement Preclude a State Court Appeal by a County Welfare Board.

The federal statute at issue is uncomplicated; it relates only to the structure of State plans for the administration of the AFDC program under Title IV of the Social Security Act. The relevant language simply provides that a State must provide for the "establishment or designation" of a single agency to administer, or to supervise the administration of, AFDC benefits. 42 U.S.C. § 602(a)(3). It does not expressly address appeal rights of local welfare boards.[14]

Nevertheless, the New Jersey court concluded that the "legislative intent" was to preclude any local welfare board from seeking judicial review of adverse

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[14] As Deputy SRS Administrator Philip Rutledge stated in a February 5, 1973 letter (Appendix E) to William H. Sheil, of petitioner's legal department:

> "Inherent in the single-State agency requirement set forth in all the public assistance titles of the Social Security Act, 42 U.S.C. §§ 302(a)(3), 602(a)(3), 1202(a)(3), 1352(a)(3), and 1396(a)(5), is that the State agency designated under these provisions must have 'the authority to make rules and regulations governing the administration of the plan by such agency or rules and regulations that are binding on the political subdivisions, if the plan is administered by them.' See 45 C.F.R. 205.100(a)(2). We therefore look to the State for proper and efficient administration of the public assistance programs. The degree to which counties are involved or not involved is optional with the State.
>
> "*The establishment of appellate procedures is, for example, purely within the discretion of the State. There are no Federal requirements concerning such procedures.*" App. E at 28a (emphasis added).

fair hearing decisions. App. A at 7a. Nowhere does the legislative history of the single State agency requirement disclose such an intent. In fact, such a result would be directly contrary to the Congressional purpose in enacting that requirement.

The single State agency requirement was included in Titles I, IV and X of the Social Security Act of 1935 [15] to secure consistency in the administration of the Act and in the distribution of its benefits. The requirement that each State designate a single entity which the federal government can hold administratively responsible for implementation of its programs is one of two principally designated to insure that each State's plan for benefit distribution is "statewide in operation." H.R. Rep. 615, 74th Cong., 1st Sess. 17 (1935).[16] As the New York court concluded in *Clemente,* a binding, state-wide judicial decision on the merits would provide a single resolution of issues raised by fair hearing decisions and thus vindicate the federal statute's purpose of uniformity. The likelihood of such decisions is enhanced by permitting rather than precluding appeals by local administrators. App. D. at 25a.

Permitting county welfare boards to obtain judicial review of the decision of the State agency is also con-

[15] *See* 42 U.S.C. §§ 302(a)(3), 602(a)(3) and 1202(a)(3). The requirement was subsequently embodied (without substantive comment) in Titles XIV and XIX of that Act upon their passage in 1950 and 1965, respectively. *Id.* §§ 1352(a)(3), 1396a(a)(5).

[16] *See also* S. Rep. 638, 74th Cong., 1st Sess. 29 (1935). The other provision required that each state's plan be effective in all of its political subdivisions, and, if administered by such subdivisions, be mandatory upon them. *See, e.g.*, 42 U.S.C. § 602(a)(1).

sistent with Congress' emphasis on such review for claimants and recipients. H.R. Rep. 615, 74th Cong., 1st Sess. 17 (1935). Congress recognized in enacting the Social Security Act that the provision for a State fair hearing "does not affect the right of further appeal to the courts." *Id.* The decision of the New Jersey Supreme Court to the contrary is demonstrably inconsistent with this legislative history.

Nor do the regulations implementing the AFDC program support the decision below. Section 205.100 (b)(2) specifically contemplates the possibility that "decisions of the single State agency [may be] subject to review . . . by other offices or agencies of the State government." App. C at 21a. In such a case it requires only that "the requisite authority of the single State agency will not be impaired." *Id.* Clearly, appeals by local administrators are no more likely to impair the authority of the State agency than are appeals by county governing boards or by AFDC claimants.

Section 205.100(b)(3), relied upon by the lower court, is equally irrelevant. It provides:

> "In the event that any services are performed for the single State agency by other State or local agencies or offices, such agencies and offices must not have authority to review, change, or disapprove any administrative decision of the single State agency, or otherwise substitute their judgment for that of the agency as to the application of policies, rules and regulations promulgated by the State agency." App. C at 21a-22a.

This regulation is directed only to the administrative structure of State plans, not to the question of stand-

ing for local agencies. It does not even implicitly refer to the issue presented here. In the words of the New Jersey Appellate Division:

> "[T]he plain meaning of the foregoing [regulation] prohibits a [county welfare] board from exercising review power on its own and does not deal in anywise with the *standing* of a board to such judicial review." App. B at 19a (emphasis in original).

Allowing a county welfare board to seek judicial review of unfavorable State agency decisions in no way vests it with authority to "review, change, or disapprove any administrative decision" of, or to "substitute [its] . . . judgment" on policy decisions for that of, the single State agency.[17]

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[17] Even assuming, *arguendo*, that some basis could be found in the federal statute for the New Jersey Supreme Court's decision, "[t]he merits of the single State agency requirements now appear to be largely historical." Report on the Intergovernmental Cooperation Act of 1968 of the Subcomm. on Int'l Gov't'l Relations of the Senate Comm. on Gov't Operations, S. Rep. 1456, 90th Cong., 2d Sess. 16 (1968). By virtue of § 204 of that Act, 42 U.S.C. § 4214, single State agency requirements can be waived by the head of a federal department or agency at the request of a State, if the objectives of the program at issue are not harmed. Pursuant to Office of Management and Budget (OMB) Circular A-102, 42 Fed. Reg. 45828, 45830 (Sept. 12, 1977), agency heads have been instructed to expedite such requests and to support any denials with detailed reasons. Additionally, in that same directive OMB has strongly recommended against such requirements in future legislation and has asked for review and legislative removal of existing single State agency provisions, all in the interest of further decentralizing rights and responsibilities under federal programs. Thus, if not reviewed, the New Jersey decision will only perpetuate an outmoded (as well as erroneous) interpretation of the single State agency requirement.

B. The New Jersey Court's Interpretation of the Social Security Act Raises Significant Federal Constitutional Questions.

The decision below holds that the Social Security Act forbids the petitioner from taking a State court appeal from the fair hearing decision of New Jersey's single State agency. If the New Jersey court has correctly interpreted the federal statute, serious constitutional questions are raised.

First, it is doubtful whether Congress has the power to enact legislation which would so overtly tamper with administration of a State court system. It is difficult to imagine a result less consistent with state sovereignty and the reserved powers of the States under the Tenth Amendment than a federal law which precludes a state court litigant from taking an appeal within the State court system.

Numerous decisions of this Court have recognized the power of the States to "provide for the determination of controversies in their courts." *Healy* v. *Ratta,* 292 U.S. 263, 270 (1934).[18] As stated by the Court in *Wolfe* v. *North Carolina,* 364 U.S. 177, 195 (1960):

> "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." Quoting *John* v. *Paullin,* 231 U.S. 583, 585 (1913).

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[18] *See also* Atlantic Coast Line R. R. v. Broth. of Locomotive Engineers, 398 U.S. 281, 285 (1970).

The New Jersey court's assertion of federal policy grounds requiring interpretation of the federal statute to preclude a state court appeal cannot save the statute from this basic constitutional deficiency. Congress is not free, even when legislating under its authority to regulate the public welfare,[19] to intrude upon the reserved power of the States to structure their appellate process. This Court has acknowledged "the wide discretion in the States to formulate their own procedures for bringing issues appropriately to the attention of their local courts, either in shaping litigation or by appeal." *Staub* v. *City of Baxley,* 355 U.S. 313, 329 (1958) (Frankfurter, J., dissenting).

> "Such methods and procedures may, when judged by the best standards of judicial administration, appear crude, awkward and even finicky or unnecessarily formal when judged in the light of modern emphasis on informality. But so long as the local procedure does not discriminate against the raising of federal claims and, in the particular case, has not been used to stifle a federal claim to prevent its eventual consideration here, this Court is powerless to deny to a State the right to have the kind of judicial system it chooses and to administer that system in its own way." *Id.* at 329.

The decision below, if correct, poses a second constitutional difficulty. By forbidding the county board to appeal within the state court system, Congress has violated its Fifth Amendment rights. This Court has

[19] *See* National League of Cities v. Usery, 426 U.S. 833, 842 (1976): "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers . . . which are conferred by Art. 1 of the Constitution."

continuously recognized that appellate procedures must be impartially provided to the litigants in a state court system. While the States are free to deny appellate remedies altogether, they may not make unreasoned distinctions among litigants in defining the appellate process. To do so denies equal protection to the disfavored litigant. *E.g., Rinaldi* v. *Yeager,* 384 U.S. 305 (1966).

> "When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey* v. *Normet,* 405 U.S. 56, 77 (1972).

The same rule applies to an act of Congress. Even if Congress could, consistent with state sovereignty, regulate or control the appellate processes of a State, it cannot do so in the manner here, where one litigant (*i.e.,* the AFDC claimant) is permitted to appeal, while the other (*i.e.,* the petitioner board) is forbidden. To do so is contrary to the Fifth Amendment.[20] The decision below suggests no basis other than the allegedly preemptive federal statute for drawing a distinction between the AFDC claimant and the welfare board. The New Jersey court does speculate that "delay and uncertainty" would be caused by permitting a county welfare board to appeal. App. A at 6a. But the court recognizes that the federal statute does not preclude a state court appeal by "the governing body of the . . . county." *Id.* at 5a. Since delay and uncertainty would undoubtedly be presented where

[20] *See, e.g.,* Weinberger v. Wisenfeld, 420 U.S. 636, 638 (1975), recognizing that the Fifth Amendment forbids federal action inconsistent with general principles of equal protection.

the county government itself takes an appeal (and similar difficulties would obviously flow from appeals by claimants, which are clearly permitted), this cannot provide a rational basis for precluding appeal by the county welfare board.

In sum, the decision below interprets the federal statute in a manner which raises serious federal constitutional questions. Normal principles of statutory interpretation, traditionally adhered to by this Court, require that a federal statute be interpreted in a manner to avoid such constitutional problems. *Ullman* v. *United States,* 350 U.S. 422, 432-33 (1956).[21] Accordingly, the federal statute at issue here should be interpreted not to preclude a state court appeal by this petitioner.

CONCLUSION

For the reasons set forth above, the petition for *certiorari* should be granted and the judgment of the Supreme Court of New Jersey reversed.

Respectfully submitted,

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April 20, 1978

[21] "[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is possible by which the question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932).

APPENDIX

APPENDIX A

Opinion

SUPREME COURT OF NEW JERSEY

A-63/64—SEPTEMBER TERM 1977

ESSEX COUNTY WELFARE BOARD, *Respondent*,

v.

DEPARTMENT OF INSTITUTIONS AND AGENCIES
and SONDRA ENGLE, *Appellants*.

ESSEX COUNTY WELFARE BOARD, *Respondents*,

v.

DEPARTMENT OF INSTITUTIONS AND AGENCIES
and IRENE STOWERS, *Appellants*.

ESSEX COUNTY WELFARE BOARD, *Respondents*,

v.

DEPARTMENT OF INSTITUTIONS AND AGENCIES
and ANN GRIECO, *Appellants*.

IN THE MATTER OF THE ESSEX COUNTY WELFARE BOARD
(LOUISE BROWN)

CAMDEN COUNTY WELFARE BOARD, *Respondent*,

v.

LINDA PERAZZELLI and
DEPARTMENT OF INSTITUTIONS AND AGENCIES, *Appellants*.

CAMDEN COUNTY WELFARE BOARD, *Respondent*,

v.

DEPARTMENT OF INSTITUTIONS AND AGENCIES
and ARLENE GIBSON, *Appellants*.

Argued November 1, 1977—Decided Jan. 5, 1978

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 147 *N.J. Super* 546 (1977).

Mr. Richard M. Hluchan, Deputy Attorney General, argued the cause for appellant Department of Institutions and Agencies (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Stephen Skillman*, Assistant Attorney General, of counsel).

Mr. Allen Zaks, of the Rutgers Legal Aid Clinic, argued the cause for appellants Irene Stowers and Sondra Engle (*Mr. Zaks* and *Mr. Larry Lesnick*, attorneys).

Mr. Frank A. De Monsi argued the cause for respondent Camden County Welfare Board.

Ms. Susan J. Barone and *Mr. Joseph P. Brennan, Jr.* argued the cause for respondent Essex County Welfare Board (*Mr. William J. Tamburri*, attorney).

The opinion of the Court was delivered by SULLIVAN, J.

The single issue in the six cases before us is whether county welfare boards whose rulings have been modified or

reversed by fair hearing decisions of the New Jersey Department of Institutions and Agencies, Division of Public Welfare, rendered in favor of welfare applicants or recipients, have a right to judicial review of such decisions. For reasons hereinafter set forth, we hold that county welfare boards may not have such judicial review.

Four of the cases involve the Essex County Welfare Board. The other two are Camden County Welfare Board matters. In each case the Welfare Board in administering the program of Aid to Families with Dependent Children (AFDC), 42 *U.S.C.A.* § 601 *et seq.*; *N.J.S.A.* 44:10-1 *et seq.*, rendered a decision adverse to the welfare applicant or recipient. The welfare client then exercised the right to a fair hearing before the Division of Public Welfare as to eligibility or grant entitlement. Following such hearing, the Director of the Division of Public Welfare rendered a final decision finding in favor of the welfare client and reversing or modifying the county welfare board's determination.

The county welfare boards filed separate notices of appeal to the Appellate Division seeking judicial review of the fair hearing decisions.[1] One of the appeals was dismissed by the Appellate Division for lack of prosecution. The local board then moved to vacate the dismissal and to reinstate the appeal. At the same time the Attorney General, on behalf of the Department of Institutions and Agencies, Division of Public Welfare, moved to dismiss the other five appeals on the ground that a local welfare board did not have the right to appeal a fair hearing decision of

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[1] In two of the appeals, Stowers and Engle, the Essex County Welfare Board applied for and was granted stays of the Division's decisions, thus precluding, for the duration of the appeals, the payment of a retroactive welfare benefit in one case and consideration of a welfare application in the other.

the Division.[2] The Attorney General also opposed the motion to reinstate the appeal basically for the same reasons set forth in the motions to dismiss.

The Appellate Division, after hearing oral argument on the motions, held that a county welfare board had standing to prosecute an appeal from a fair hearing decision of the Division. Its opinion denying the motions to dismiss and granting the motion to reinstate is reported at 147 *N. J. Super.* 546 (App. Div. 1977). This Court granted the Attorney General's motions to appeal the Appellate Division ruling. We also granted motions by welfare clients Stowers and Engle to appeal in their cases. 74 *N. J.* 256 (1977). We reverse.

The AFDC program was established by the Congress of the United States. 42 *U.S.C.A.* § 601 *et seq.* No state is required to participate in AFDC but those which elect to do so, and which seek to share in federal funding, must comply fully with federal law and regulations. New Jersey has elected to participate in the program, *N.J.S.A.* 44:10-1 *et seq.*, and receives a substantial share of administrative expenses and 50% of the amount of AFDC grants from the federal government. Thirty-seven point five per cent of the grant money is provided by the State with the balance of 12.5% being required to be raised by the particular county. *N.J.S.A.* 44:10-5.

The federal AFDC law requires that a State plan provide for the establishment or designation of "a single State agency" to administer the program. 42 *U.S.C.A.* § 602(a)(3). Although subordinate local agencies may be created or designated to carry out the AFDC program, such agencies "must not have authority to review, change or disapprove any administrative decision of the single

[2] Stowers and Engle, the two welfare clients whose fair hearing decisions had been stayed, joined in the Attorney General's motions in their cases.

State agency, or otherwise substitute their judgment for that of the agency as to the application of policies, rules and regulations promulgated by the State agency." 45 *C.F.R.* § 205.100(b).

In New Jersey the single State agency designated to administer the AFDC program is the Department of Institutions and Agencies (now Department of Human Services), Division of Public Welfare. *N.J.S.A.* 44:10-2; 44:10-3. County welfare boards, by statutory provision, actually administer the program at the local level subject to the supervision of the Department which has adopted general policies, rules and regulations for carrying out the purposes of the program. See *N.J.A.C.* 10:81-1.1 *et seq.*; *Redding* v. *Burlington Cty. Welf. Bd.*, 65 *N.J.* 439, 442 (1974).

The Appellate Division held that the right of a county welfare board to appeal a fair hearing decision by its superior in the AFDC hierarchy existed for two reasons. First, it found in the *New Jersey Constitution* (1947), Art. VI, § V, par. 4 as implemented by *R.* 2:2-3(a)(2), review as of right of final decisions of state agencies by an action in lieu of prerogative writs. Second, it held that since countries must provide 12.5% of AFDC grant money, county welfare boards have a financial interest directly related to the public interest thereby giving them sufficient standing to seek judicial review. 147 *N. J. Super.*, *supra* at 553-554.

The proposition that a fair hearing decision by the Division is subject to judicial review is not open to question. Standing to obtain judicial review, however, is something else. Certainly a welfare client aggrieved by a fair hearing decision would have the right to judicial review pursuant to *R.* 2:2-3(a)(2). So too would the governing body of the particular county since it provides a substantial part of the AFDC grant money.

The county welfare board though, in administering the AFDC program, is a subordinate branch of the single State agency and has no standing as such to have judicial review of fair hearing decisions by its superior agency. In its capacity as local administrator, it exercises a statutory function in the overall program. It has no other interest to assert.

Moreover, the nature of the AFDC program militates against permitting the local agency to have judicial review of fair hearing decisions favorable to a welfare client. The people involved are needy and poor. They live from day-to-day dependent on AFDC grants. To involve the judiciary in the routine review of these grants and the underlying factual determinations would cause delay and uncertainty, preventing those who need help the most from realizing the benefits the program is intended to provide.

In a basically similar type of case the Supreme Court of New York barred judicial review to a local welfare office, saying this:

> The welfare application and appeal process is an intra-agency process that moves from initial intake to final determination by the State Commissioner pursuant to unified and prescribed procedures fixed by a federal and state statutory scheme—augmented by the regulations promulgated thereunder by the State Commissioner as head of the State Department of Social Services. Within this intra-agency structure, noncompliance with the State Commissioner's adverse Fair Hearing decisions does not raise the local welfare official to the status of an aggrieved party sufficient to permit access to the courts. To hold otherwise would thrust the courts into a morass of administrative decision-making. As succinctly stated by Mr. Justice Molinari in *Smythe,* supra, " • • • the Broome County Commissioner of Social Services, as a subordinate officer in an administrative agency, may not properly

> seek judicial review of his immediate supervisors decision." *Reed* v. *New York State Dept. of Social Services,* 354 *N.Y.S.* 2d 389, 394 (Sup. Ct. 1974).

On balance, we conclude that the legislative intent as expressed in the Federal and State enactments, does not allow for an appeal by a local welfare board from a fair hearing decision by the Division which modifies or reverses a ruling of the local board. The public interest in having these matters fairly decided and the program properly administered is amply protected by the safeguards and checks built into the joint federal-state operation. And, of course, the right of the governing body of a county to appeal a fair hearing decision in an appropriate case remains.

The appeals herein are hereby dismissed.

APPENDIX B

ESSEX COUNTY WELFARE BD. v. DEPT. OF I. & A.

Cite as 371 A.2d 771

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147 N.J.Super. 546

ESSEX COUNTY WELFARE BOARD, *Appellant*,

v.

DEPARTMENT OF INSTITUTIONS AND AGENCIES
and SONDRA ENGLE, *Respondents*.

ESSEX COUNTY WELFARE BOARD, *Appellant*,

v.

DEPARTMENT OF INSTITUTIONS AND AGENCIES
and IRENE STOWERS, *Respondents*.

ESSEX COUNTY WELFARE BOARD, *Appellant*,

v.

DEPARTMENT OF INSTITUTIONS AND AGENCIES
and ANN GRIECO, *Respondents*.

IN THE MATTER OF THE ESSEX COUNTY WELFARE BOARD
(LOUISE BROWN)

CAMDEN COUNTY WELFARE BOARD, *Appellant*,

v.

LINDA PERAZZELLI and
DEPARTMENT OF INSTITUTIONS AND AGENCIES, *Respondents*.

CAMDEN COUNTY WELFARE BOARD, *Appellant*,

v.

DEPARTMENT OF INSTITUTIONS AND AGENCIES
and ARLENE GIBSON, *Respondents*.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION.

ARGUED NOV. 23, 1976.

DECIDED JAN. 31, 1977.

County welfare boards, which had terminated or reduced grants of public assistance under aid to families with dependent children program sought to obtain judicial review from final fair hearings of the Division of Public Welfare in which the Director reversed or revised the board's decision. The Attorney General moved to dismiss and the board moved to reinstate one appeal. The Superior Court, Appellate Division, Matthews, P. J. A. D., held that at a minimum the boards had standing to seek judicial review as representatives of the citizens and taxpayers, especially since 12½% of the funds for the AFDC program were supplied by the counties and if the welfare boards were not entitled to seek judicial review the county taxpayers would be without representation with respect to a final agency determination directly affecting their financial interests.

Motions to dismiss denied; motion to reinstate granted.

1. Administrative Law and Procedure

Majority rule is that a subordinate official or agency does not have standing to challenge the decision of a superior administrative board; however, when a public officer or authority proceeds by an action in lieu of prerogative writ the situation is distinguishable.

2. States

A taxpayer has standing to challenge illegal disbursement of public funds or other wrongful conduct; traditionally, an action by taxpayers in lieu of prerogative writs had been utilized to seek review of such official action.

3. Social Security and Public Welfare

County welfare board had standing to obtain judicial review of determinations of Division of Public Welfare reversing or revising welfare board's termination or reduction of grants of assistance under aid to families with dependent children program; board had standing as a representative of the citizens and taxpayers of the county since counties are required to contribute 12½% of the costs of such program and if board was not entitled to judicial review the taxpayers would be without representation with respect to final agency action directly affecting their financial interest. Social Security Act, §§ 401 et seq., 402(a)(3), 42 U.S.C.A. §§ 601 et seq., 602(a)(3); N.J. S.A. 44:10-1 et seq.

4. Social Security and Public Welfare

Department of Health, Education, and Welfare regulation that in event any services under aid to families with dependent children program are performed for the single state agency by other state or local agencies or officers such agencies and officers must not have authority to review or change any administrative decision of the single agency merely prohibits a lower agency from exercising review

power on its own and does not deal with standing of a lower agency to seek judicial review of adverse action of a higher administrative body. Social Security Act, § 402(a)(3), 42 U.S.C.A. § 602(a)(3).

Susan J. Barone, Newark, and Joseph P. Brennan, Jr., West Orange, for Essex County Welfare Bd. (William J. Tamburri, Counsel, Essex County Welfare Bd., West Orange, attorney).

Frank A. Demonsi, Camden, for Camden County Welfare Bd. (Mary E. Dugdale, Chief Counsel, Camden County Welfare Bd., Camden, attorney).

Richard M. Hluchan, Deputy Atty. Gen., for respondent Dept. of Institutions and Agencies (William F. Hyland, Atty. Gen., attorney; Stephen Skillman, Asst' Atty. Gen., of counsel).

Allen Zaks, Newark, of Rutgers Legal Aid Clinic, for respondent Stowers.

Before Judges Matthews, Seidman and Horn.

The opinion of the court was delivered by Matthews, P. J. A. D.

The single issue with which we deal in these cases is whether a county welfare board, which has terminated or reduced a recipient's grant to public assistance, available through the program of Aid to Families with Dependent Children (AFDC), may obtain judicial review from a final fair hearing of the Division of Public Welfare in which the Director reversed or revised the decision of the board.

Procedurally, the issue before us is presented by the Attorney General's motions to dismiss the captioned appeals, and, in Docket A-2733-75, the motion of the welfare board to reinstate. We do not deal with the merits of any

of the appeals; however, we make brief reference to the facts involved in each to establish the context in which the motions to dismiss and reinstate have been made.

In A-1780-75 respondent Engle applied on August 6, 1975 to the Essex County Welfare Board for Aid to Families with Dependent Children (AFDC), a public assistance program funded jointly by the State and Federal Governments. 42 *U.S.C.A.* § 601 *et seq.*; *N.J.S.A.* 44:10-1 *et seq.* Since her application indicated that she was immediately in need of assistance, the board issued her a "presumptive eligibility" grant in the amount of $310 by authority of the Public Assistance Manual (PAM), a compendium of the New Jersey public assistance regulations promulgated by respondent Department of Institutions and Agencies. Specific authority for "presumptive eligibility" is contained in PAM § 1120, which provides:

> • • • When immediate need is apparent an applicant provides evidence of eligibility by written statement signed under oath, the director of the county welfare board shall issue a grant effective as of the date of application.

Once a "presumptive eligibility" grant is issued, it is the county welfare board's duty to investigate the recipient's eligibility in order either to validate her eligibility or determine that she is ineligible for assistance. This process must be completed within two months. However, the county board's interim failure to take final action on an application must not operate to penalize the recipient. Thus, the recipient remains presumptively eligible until her case is either validated or deemed ineligible. PAM §§ 2910, 3110, 4311.

Although Ms. Engle received an AFDC check for August due to her "presumptive eligibility," no check was issued to her by the Essex County Welfare Board for the month of September, nor did she receive any notice to the effect that

a September check would not be forthcoming. On September 25, 1975, however, the board concluded as a result of its investigation that she was ineligible for AFDC assistance and sent her written notice of this determination on the same date.

In exercise of her rights under 45 *C.F.R.* § 213 and PAM § 6000, Ms. Engle requested an administrative fair hearing to contest the Essex County Welfare Board's failure to issue a grant to her for the month of September as well as the board's final denial of her application on September 25. As a result of the hearing, which was conducted on November 17, 1975, the Division of Public Welfare affirmed the board's denial of Ms. Engle's application but ruled that she should have been issued a "presumptive eligibility" grant on September 1 absent a ten-day notice from the board specifying why it would not make such a payment. The Division ordered the board to pay Ms. Engle the amount of the withheld September grant retroactively.

Respondent Engle did not appeal from the denial of AFDC eligibility, but the Essex County Welfare Board, on January 28, 1976 filed a notice of appeal challenging only the Division's decision that she should have been granted a "presumptive eligibility" payment for September. On February 20, 1976 we granted appellant's motion for a stay of the fair hearing decision pending the disposition of the merits of this case.

In A-2080-75 respondent Stowers applied on September 3, 1975 to the Essex County Welfare Board for AFDC. The board failed to process the application and no adequate written explanation for denying assistance was forthcoming.

Respondent thereafter requested a fair hearing, which was conducted on October 29, 1975. As a result thereof the Director of the Division of Public Welfare directed the Essex County Welfare Board to proceed to determine Ms. Stowers' eligibility and grant AFDC retroactive to the date

of the application. The board was further directed to register her for manpower services, training or employment, in accordance with Public Assistance Manual § 3400.

The board filed a notice of appeal from this determination. Moreover, the board applied for, and on March 16, 1976 we granted, a stay of the implementation of that decision pending disposition of the appeal on the merits.

In A-2381-75 respondent Grieco is a recipient of AFDC on behalf of herself and her two minor children. The Essex County Welfare Board proposed to reduce Ms. Greico's grant due to her alleged failure to report certain income to the board.

Respondent then requested a fair hearing, which was conducted on December 10, 1975. As a result thereof the Director of the Division of Public Welfare reversed the Essex County Welfare Board's decision to reduce her grant. The Board then appealed.

In A-2733-75 the Essex County Welfare Board notified respondent Brown on November 19, 1975 that her entitlement to public assistance payments pursuant to the AFDC program was being terminated. Respondent requested and was granted an administrative fair hearing to contest the board's determination, and on March 15, 1976 the Division of Public Welfare reversed the board's action and directed that she be retroactively reinstated into the AFDC program for reasons which are of no pertinence here. The board appealed.

Thereafter, on August 23, 1976, we dismissed the appeal on our own motion because no brief had been filed by the welfare board. *R.* 2:9 9. The board now moves to vacate the order of dismissal, claiming that its brief was in fact filed on August 20, 1976.

In A-2882-75 respondent Perazzelli is a recipient on behalf of her four minor children of public assistance under AFDC. The Camden County Welfare Board, on December

18, 1975, notified respondent of its intent to reduce her assistance benefits by $322, the amount of the monthly mortgage payments made by her estranged husband on her home.

Respondent thereafter requested the convening of a fair hearing, which was conducted on February 19, 1976. As a result thereof the Director of the Division of Public Welfare revised the Camden County Welfare Board's decision to reduce her grant. The board then appealed.

In A-3891-75 respondent Gibson is a recipient on behalf of herself and her two minor children of AFDC. The Camden County Welfare Board proposed to terminate Ms. Gibson's grant for failure to provide certain information.

Respondent therefore requested a fair hearing, which was conducted on April 13, 1976. As a result thereof the Director of the Division of Public Welfare reversed the Camden County Welfare Board's decision to terminate her grant and directed that assistance be reinstated retroactively. The appeal followed.

The welfare boards contend that they are entitled to judicial review by virtue of the following factors: (1) In New Jersey the courts have traditionally taken a liberal approach to the question of standing; (2) although the pertinent federal regulations, 42 *U.S.C.A.* § 602(a)(3), 45 *C.F.R.* 205.100(b)(3), were designed to vest the administrative authority for AFDC in the "single State Agency," since the boards are not seeking to override the Division of Public Welfare's determinations but are merely seeking review of its decisions, the ultimate authority of the Division would not be undercut by this action; (3) since the county taxpayers supply approximately 13% of the funds necessary to support the AFDC program, the boards have a financial interest in the outcome, and (4) should it be determined that the welfare boards are not entitled to judicial review, the taxpayers of the county would be without a party to represent their financial interest.

The majority rule appears to be that a subordinate official or agency does not have standing to challenge the decision of a superior administrative board. *Lee* v. *Civil Aeronautics Board,* 96 *U.S.App.D.C.* 299, 225 F.2d 950, 951 (D.C.Cir.1955); *State* v. *Donnelly,* 365 *Mo.* 686, 285 *S.W.*2d 669 (Sup.Ct.1956); *Reed* v. *New York St. Dept. of Social Services,* 78 *Misc.*2d 266, 354 *N.Y.S.*2d 389, 394 (Sup.Ct. 1974). See also, *Jaffe, Judicial Control of Administratice Action,* 538 at n. 133 (1965); Davis, "Standing of a Public Official to Challenge Agency Decisions: A Unique Problem of State Administrative Law," 16 *Admin.L.Rev.* 163, 170-71 (1964).

However, when a public officer or authority proceeds by an action in lieu of prerogative writs, the situation is distinguishable. *See Jaffe, op. cit.,* at 538. In this regard it has been pointed out that "New Jersey • • • occupies a rather special position in administrative law," *Jaffe, op. cit.* at 535, due in part to the fact that

> • • • judicial review of administrative agency decisions has the support of a special constitutional provision. *N.J.Const.* (1947), Art. VI, § 5, ¶ 4. This constitutional underpinning of the right of judicial review largely immunizes it from legislative curbs. *In re Senior Appeals Examiners,* 60 *N.J.* 356, 290 *A.*2d 129 (1972). The court rule which implements the constitutional provision provides for review as of right of final decisions of state agencies. *R.* 2:2-3(a)(2). • • • [*State* v. *Council of N. J. State College Locals,* 141 *N.J.Super.* 470, 474, 358 *A.*2d 823, 825 (App.Div.1976)]

Our State has consistently been recognized as the " 'jurisdiction in which judicial review has been most freely available with the least encumbrance of technical apparatus.' " *In re Senior Appeals Examiners,* 60 *N.J.* 356, 363, 290 *A.*2d 129, 133 (1972). Consequently, we have consistently held that:

> In our State, perhaps more than any other, the prerogative writ has been broadly made available as a comprehensive safeguard against wrongful official action. [*Walker* v. *Stanhope,* 23 *N.J.* 657, 661, 130 *A.*2d 372, 374 (1957)].

Of equal importance is the fact that it has also been long established in this State that a taxpayer has standing to challenge illegal disbursements of public funds or other wrongful conduct. *Ferry* v. *Williams,* 41 *N.J.L.* 332, 339 (Sup.Ct.1879); *Haines* v. *Burlington Cty. Bridge Ass'n,* 1 *N.J.Super.* 163, 171, 63 *A.*2d 284 (App.Div.1949); *Crescent Pk. Tenants Ass'n* v. *Realty Eq. Corp. of N. Y.,* 58 *N.J.* 98, 102, 275 *A.*2d 433 (1971). Traditionally, an action by taxpayers in lieu of prerogative writs has been utilized to seek review of such official action. *See, e.g., Ferry* v. *Williams,* above; *Koch* v. *Seaside Heights,* 40 *N.J.Super.* 86, 93, 122 *A.*2d 250 (App.Div.1956), aff'd 22 *N.J.* 218, 125 *A.*2d 402 (1956). See generally, *Jaffe, op. cit.* at 468, 473.

While the county welfare boards here involved are not suing as individual taxpayers *per se,* " 'if the court will allow a citizen or taxpayer to sue, standing of a representative association would seem almost a fortiori.' " *Crescent Pk. Tenants Ass'n,* above, 58 *N.J.* at 106, 275 *A.*2d at 437. In this case it is clear that since 12½% of the funds for the AFDC program is supplied by the various counties (37½% comes from the State and 50% from the federal level), the county welfare boards, in a representative capacity, have a financial interest directly related to the public interest. *Cf. Town of Milford* v. *Commissioner of Motor Vehicles,* 139 *Conn.* 677, 96 *A.*2d 806, 808 (Sup.Ct.Err.1953); *In re Halifax Paper Co.,* 259 *N.C.* 589, 131 *S.E.*2d 441 (Sup.Ct. 1963).

Our courts have accorded standing to a plaintiff who is neither a citizen or taxpayer but whose individual interest "coincided with a strong public interest," *Walker* v. *Stanhope,* above, 23 *N.J.* at 664, 130 *A.*2d at 876. We conclude,

a fortiori, that county welfare boards whose actions directly affect the public interest should be granted the right to seek judicial review.

We also find justification for the expressed concern that if the county welfare boards are not entitled to judicial review, the taxpayers of the counties involved would be without representation with respect to a final agency determination directly affecting their financial interests. See, *e. g., Scanwell* v. *Laboratories Inc.* v. *Shaffer,* 137 *U.S.App.D.C.* 371, 424 *F.*2d 859, 866-867 (D.C.Cir.1970) (where it was indicated that plaintiff in that case seemed to be the only person likely to institute the action).

Defendants, citing *Bonnet* v. *State,* 141 *N.J.Super.* 177, 357 *A.*2d 772 (Law Div. 1976), argue that the county welfare board's financial interest does not provide a sufficient basis to give plaintiffs standing. In *Bonnet* Essex County taxpayers, Essex County and 22 municipalities within the county, and other parties, instituted an action challenging the constitutionality of the State's participation in the public assistance program in which the counties are required to contribute 12½% of the costs. The trial judge concluded that the county did not have standing since it had failed to show "any of the statutes in question [had] prevented the county from rendering any essential service which it is authorized to provide. The county's interest in this is in its governmental capacity only." 141 *N.J.Super.* at 203, 357 *A.*2d at 786. He further determined that "[n]either the county nor any other municipality ha[d] made a showing similar to that of Newark." (at 207, 357 *A.*2d at 788), the latter having established that "its interest [was] the same as other taxpayers," (at 206, 357 *A.*2d at 788).

Bonnet is clearly distinguishable since (1) plaintiffs there were seeking an injunction against the collection of taxes for the payment of these costs, 141 *N.J.Super.* at 191, 357 *A.*2d 722, and not a determination involving an agency's

action, and (2) the trial judge was not presented with a situation, as here, where the county was the *only* party who had undertaken any action in this regard.

Finally, we find nothing in the federal regulations promulgated by HEW with respect to the "single State agency" requirement which bars the boards from seeking judicial review of Division determinations. The regulations in question which are relied upon by the Department read:

> (1) The State agency will not delegate to other than its own officials its authority for exercising administrative discretion in the administration or supervision of the plan including the issuance of policies, rules and regulations on program matters.
>
> (2) In the event that any rules and regulations or decisions of the single State agency are subject to review, clearance, or other action by other offices or agencies of the State government, the requisite authority of the single State agency will not be impaired.
>
> (3) *In the event that any services are performed for the single State agency by other State or local agencies or offices, such agencies and offices must not have authority to review, change, or disapprove any administrative decision of the single State agency,* or otherwise substitute their judgment for that of the agency as to the application of policies, rules, and regulations promulgated by the State agency. [45 *C.F.R.* § 205.100(b); emphasis supplied.]

In our view, the plain meaning of the foregoing prohibits a board from exercising review power on its own and does not deal in anywise with the *standing* of a board to such judicial review. The Attorney General conceded at oral argument that a citizen and taxpayer of a county would unquestionably have the right and standing to review Division determinations such as those involved in these appeals. We simply hold today that, at the minimum, the boards

have standing to such judicial review as representatives of the citizens and taxpayers of a county. *Reed* v. *N. Y .State Dept. of Social Services,* 78 *Misc.*2d 266, 354 *N.Y.S.*2d 389, 394 (Sup.Ct.1974), relied on by the Department, is not apposite since the conclusion that

> • • • Within this intra-agency structure, non-compliance with the State Commissioner's adverse Fair Hearing decisions does not raise the local welfare official to the status of an aggrieved party sufficient to permit access to the courts. To hold otherwise would thrust the court into a morass of administrative decision-making. [85⅘ *N.Y.S.*2d at 394]

was decided under New York law principles relating to standing.

The motions to dismiss in docket numbers A-1780-75, A-2080-75, A-2381-75, A-2882-75 and A-3891-75, are denied; the motion to reinstate in docket A-2733-75 is granted.

APPENDIX C

§ 205.100 Single State agency.

(a)(1) *State plan requirements.* A State plan under title I, IV-A, VI, X, XIV, XVI, or XIX of the Social Security Act must:

(i) Provide for the establishment or designation of a single State agency with authority to administer or supervise the administration of the plan.

(ii) Include a certification by the attorney general of the State identifying the single State agency and citing the legal authority under which such agency administers, or supervises the administration of, the plan on a statewide basis including the authority to make rules and regulations governing the administration of the plan by such agency or rules and regulations that are binding on the political subdivisions, if the plan is administered by them.

• • •

(b) *Conditions for implementing the requirements of paragraph (a) of this section.* (1) The State agency will not delegate to other than its own officials its authority for exercising administrative discretion in the administration or supervision of the plan including the issuance of policies, rules, and regulations on program matters.

(2) In the event that any rules and regulations or decisions of the single State agency are subject to review, clearance, or other action by other offices or agencies of the State government, the requisite authority of the single State agency will not be impaired.

(3) In the event that any services are performed for the single State agency by other State or local agencies or offices, such agencies and offices must not have authority to review, change, or disapprove any administrative decision of the single State agency, or otherwise substitute their

judgment for that of the agency as to the application of policies, rules, and regulations promulgated by the State agency.

[39 FR 9513, Mar. 11, 1974, as amended at 39 FR 34543, Sept. 26, 1974]

APPENDIX D

SUPREME COURT—APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

January 19, 1978

In the matter of PAMELA CLEMENTE, *Respondent*,

v.

JOHN J. FAHEY, as Commissioner of the Albany County Department of Social Services, *Appellant*,

and

STEPHEN BERGER, as Commissioner of the New York State Department of Social Services, *Respondent*.

Appeal from a judgment of the Supreme Court at Special Term, entered August 26, 1976 in Albany County, which, in a proceeding pursuant to CPLR article 78, dismissed the answer of respondent Fahey insofar as it attempted to challenge a fair hearing decision of respondent Berger, dismissed the petition as against respondent Berger, and directed respondent Fahey to reimburse petitioner for alleged underpayments of aid for the period January 1, 1975 to May 31, 1975.

During the period from January 1, 1975 to May 31, 1975 petitioner and her child were recipients of public assistance in the Aid to Families with Dependent Children category. At this same time petitioner was also an enrolled full-time student at the State University of New York at Albany and, as a result, the recipient of a National Direct Student Loan, a Supplemental Educational Opportunity Grant and an Educational Opportunity Program (EOP) Grant. The instant controversy arose when, pursuant to 18 NYCRR 352.16 as it then existed, respondent Fahey reduced petitioner's public assistance grant by an amount

from her EOP grant which he determined was available to her as a resource or income. This was upheld by Commissioner Berger in a decision rendered on March 19, 1975 following a fair hearing. Subsequently, 18 NYCRR 352.16 was amended on June 6, 1975 so as to exclude from consideration as income for the purposes of public assistance all Federal education grants as well as any other grant used for necessary or essential school expenses including child care services. Upon this development, petitioner sought and was granted a second fair hearing after which, by decision rendered on September 30, 1975, the Commissioner determined that none of petitioner's grants or loans were to be used to reduce her budgetary needs and directed respondent Fahey to provide petitioner with a supplemental grant for the underpayments resulting from his budgeting of her EOP grant to reduce her public assistance.

Thereafter, when it became clear that respondent Fahey would be issuing no supplemental grant to petitioner on the ground that petitioner was then and had been receiving full assistance since June 1, 1976 when the school year terminated, a date prior to the amendment of 18 NYCRR 352.16 and the second fair hearing, petitioner commenced this proceeding. By judgment dated July 30, 1976, Special Term then dismissed because of his alleged lack of standing respondent Fahey's answer insofar as it attempted to challenge the Commissioner's decision of September 30, 1975, dismissed the petition against Commissioner Berger, and directed respondent Fahey to reimburse petitioner for underpayments of aid during the period January 1, 1975 to May 31, 1975. This appeal ensued.

Considering initially the issue of standing, we hold that Special Term erred insofar as it dismissed respondent Fahey's answer on that ground. Since the County of Albany concededly provides 25% of the funding for petitioner's public assistance grants, respondent Fahey, as representative of the County and its taxpayers, plainly has standing and a fiduciary obligation to challenge alleged

improper expenditures of those funds even when ordered by the State Commissioner, and any abrogation of his right to do so would constitute the taking of property without due process of law. Only recently, in *Matter of Beaudoin* v. *Toia* (58 A D 2d 393), we ruled on a similar challenge by the Commissioner of Rensselaer County and, thus, recognized the capacity of local officials to seek court review of the State Commissioner's determinations.

In so ruling that respondent Fahey has the necessary standing herein, we would further point out that our decision in no way conflicts with Federal statutes and regulations mandating a single State plan for aid and services to the needy (see, e.g., U.S. Code, tit. 42, § 602, subd. [a], par. 1) to be administered by a single State agency (see, e.g., 45 CFR 205.100). These Federal guidelines are neither circumvented nor ignored by a grant of standing in this instance because the resultant judicial determination will establish a unified policy for the State and said policy will then be administered by the State agency throughout the State. Moreover, statutes establishing that decisions of the State Commissioner are binding upon the local social services district involved (see, e.g., Social Services Law, § 353) likewise do not bar challenges by the localities to decisions allegedly arbitrary and capricious or erroneous as a matter of law (cf. *Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N Y 2d 127; *Matter of City Council of Watertown* v. *Carbone*, 54 A D 2d 461; *Matter of Pauling* v. *Smith*, 46 A D 2d 759), and since the review thereof is conducted by the courts and not the local agencies, there is also no conflict with 45 CFR 205.100, which prohibits review of any administrative decision of the State agency by a local unit.

Turning now to the substantive determination of Special Term whereby respondent Fahey was directed to reimburse petitioner for underpayments of aid for the period January 1, 1975 to May 31, 1975, we find that this was similarly improper and that there were no underpayments. As evi-

denced by the original decision of respondent Berger rendered on March 19, 1975, respondent Fahey's action in reducing petitioner's public assistance during the period in question was entirely consistent with State policy as it then existed and continued until June 6, 1976. On this latter date, as noted above, 18 NYCRR 352.16 was amended so as to broaden the categories of grants to be excluded from consideration as income when determining the amounts of public assistance to be awarded, but said amendment occurred subsequent to May 31, 1975 and, prior thereto, 18 NYCRR 352.16 required the reduction of public assistance awards to the extent that EOP grants were available to meet the living needs of an individual and his or her dependents.

With regard to these challenged reductions, we would emphasize, in conclusion, that respondent Fahey's actions were not taken in contravention of Federal policy because EOP grants are State-funded, and furthermore, nothing in the amended regulation or otherwise warrants retroactive application of the significant policy change embodied therein so as to grant petitioner reimbursement, particularly where, as here, substantial pre-existing rights would thereby be affected (*Shielcrawt* v. *Moffett,* 294 N.Y. 180; *Matter of Dickson Painting* v. *Larry Walter, Inc.,* 55 A D 2d 777; *Matter of Cornell Apartments* v. *Corcoran,* 182 Misc. 660). In addition, our resolution of this appeal is consistent with our holding in *Matter of Lumpkin* v. *Dept. of Social Serv. of the State of New York* (—— A D 2d —— [Dec. 8, 1977]) wherein we also sought to avoid windfalls to recipients of public loans or grants resulting from the duplication or overlapping of various awards financed from the public treasury.

Judgment reversed, on the law, without costs.

KANE, MAIN and LARKIN, JJ., concur; GREENBLOTT, J. P., and MIKOLL, J., dissent and vote to affirm in the following memorandum by GREENBLOTT, J. P.

GREENBLOTT, J. P. (dissenting).

We respectfully dissent. We would affirm on the opinion of Mr. Justice Staley with the following comment. A local Social Services agency, being part of the same administrative agency as the Department of Social Services and, in reality, an agent of the Commissioner, has no authority or standing as an aggrieved party to challenge a decision of the Commissioner by way of an article 78 proceeding. In our view, if a local commissioner takes exception to the State Commissioner's legal interpretations or finds the statute and regulations upon which a fair hearing determination rests to be somehow deficient, he must commence a declaratory judgment action to determine his claims. He certainly has no unrestricted right of review by way of an article 78 proceeding, as the majority holds. Much less does he have the right to ignore an adverse fair hearing determination, force the applicant to bring an article 78 proceeding to enforce the determination and then raise any objections to the determination he might have. That determination is binding on him unless and until he obtains a declaration that the State Commissioner acted illegally or wrongfully. Respondent Fahey made no such attempt here and is foreclosed from raising any legal objections to the fair hearing determination. Further, the administrative agent is required by Federal and State regulations to make *prompt* payment to the applicant when the hearing decision is in the applicant's favor (45 CFR 205.10 [a] [16], [18]; NYCRR 358). The majority's failure to require immediate payment prior to interposition of an appeal jeopardizes New York's right to Federal assistance.

The order should be affirmed.

APPENDIX E

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

OFFICE OF THE ADMINISTRATOR

William H. Sheil, Esq.
Essex County Welfare Board
Legal Department
Hall of Records—Room 104
Newark, New Jersey 07102

Dear Mr. Sheil:

Secretary Richardson has asked me to respond to your letters of November 27, 1972 and December 11, 1972, concerning the November 21, 1972 Resolution passed by the Essex County Welfare Board. This resolution asked the Secretary to hold a hearing around the subject of proper and efficient administration of the State Plan as it relates to "a fundamental right to appellate review."

Inherent in the single-State agency requirement set forth in all the public assistance titles of the Social Security Act, 42 U.S.C. §§ 302(a)(3), 602(a)(3), 1202(a)(3), 1352(a)(3), and 1396(a)(5), is that the State agency designated under these provisions must have "the authority to make rules and regulations governing the administration of the plan by such agency or rules and regulations that are binding on the political subdivisions, if the plan is administered by them." See 45 CFR 205.100(a)(2). We therefore look to the State for proper and efficient administration of the public assistance programs. The degree to which counties are involved or not involved is optional with the State.

The establishment of appellate procedures is, for example, purely within the discretion of the State. There are no Federal requirements concerning such procedures.

Nevertheless, we believe in the fullest possible dialogue between local officials and the State to establish the climate necessary for effective operations and to prevent a failure of confidence.

Our New York Regional Office has been in contact with the Commissioner, Department of Institutions and Agencies, and has tried to facilitate arrangements for discussions of matters of mutual interest both to that Department and to the counties. Regional representatives of the Social and Rehabilitation Service have been assured that the State agency is amenable to the concept of an appellate procedure but that the boundaries of an appeal mechanism have yet to be defined.

As an illustration of the need for hearings, the Essex County position paper cited the problem of labor relations and the recent overruling of salary increases agreed to by the County Welfare Board. The Merit Systems and Technical Assistance Branch, Division of Intergovernmental Personnel Programs, United States Civil Service Commission has responsibility for interpretation of Standards for a Merit System of Personnel Administration promulgated by the Departments of Health, Education and Welfare, Labor and Defense. Thus Federal agencies are interested in the development and continued improvement of State and local merit systems but exercise no authority over the selection, tenure of office or compensation of any individual employed in conformity with the provisions of such system.

Commissioner Clifford has shared with us a recent opinion by the Attorney General, State of New Jersey which states in part: "It is our conclusion based on the following analysis that the State through the Department of Institutions and Agencies, Division of Public Welfare, and the Office of Employee Relations, has the statutory authority to approve or disapprove the terms and conditions of employment, including salary, contained in the collective negotiation agreements between the county welfare boards and the employee majority representatives."

It is our understanding that the Division of Welfare transmitted this opinion to all County Welfare Directors by means of Circular Letter No. 72-10-4 dated October 25, 1972.

The Federal position is that the State, at its option, may leave matters of local compensation to a local government; or it may retain full or partial control of local compensation plans. In other words, the choice is that of the State and not the local government. Furthermore, whatever choice the State makes with respect to local compensation systems, under the single-State agency requirement the State agency remains responsible to the Federal government, and the local government may not interfere with that State responsibility by excluding the State from exercising necessary supervision over the localities.

Based upon this reading of Federal requirements and policies, we believe that this is a matter best left to negotiations and decision between the counties and the State agency. Given the information available to us, there would be no basis for holding a hearing since no conformity issue on this point exists.

Sincerely,

/s/ PHILIP RUTLEDGE
Philip Rutledge
Deputy Administrator, SRS